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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

COMMENTS OF LIFETIME TELEVISION

LIFETIME TELEVISION
36-12 35th Avenue
Astoria, New York 11106

January 25, 1993

CONTENTS

SUMMARY

Lifetime Television ("Lifetime") submits these comments in response to the Notice of Proposed Rule Making to implement Section 628 of the Communications Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). Lifetime is a basic cable television network serving an estimated 56.5 million subscribers on some 6,000 cable systems with contemporary, innovative programming of special interest to women.

These comments are limited to a single, yet crucial issue, the appropriate standard for determining whether a multiple cable system operator ("MSO") holds an attributable interest in a cable television network for purposes of the Cable Act's program access provisions. Lifetime submits that adoption of the existing broadcast attribution rules to implement Section 628 would unnecessarily encompass minority investments which create no real potential for anticompetitive actions.

Furthermore, the effect of an overly-broad attribution standard such as the broadcast rules would necessarily be to hinder capital investment in program creation and distribution, contrary to the Cable Act's goals of expanding programming and promoting diversity. Cable operators would reduce their stake in existing programmers, and refrain from investing in new or failing program services, in order to avoid the statutory program access requirements.

Should the Commission decide to rely on the existing broadcast attribution rules, however, it must adopt certain modifications to ensure that their wide sweep does not unnecessarily burden MSO investment in programmers where no anticompetitive potential exists. As one such modification, Lifetime proposes that the interest of a cable system operator, even if above the attribution benchmark, be exempted from attribution if another entity which is not a cable system operator holds an interest greater than 50 percent in the satellite cable programmer. Neither a minority shareholder nor partner would have the power to force a programming vendor to take anticompetitive actions. It should also be of no consequence that a cable system operator with a minority share in a program network has a common officer or director with the network.

Lifetime proposes an additional safeguard to the attribution analysis to measure the possibility of _de facto_ control created by access to subscribers rather than ownership. Despite the existence of a controlling entity without interests in cable systems, the program access requirements would be applied to an MSO holding a minority interest if it owns or operates cable systems serving more than five percent of the network's subscribers. The restrictions would _only_ apply in those markets where the MSO's systems are located, because that is where the potential for anticompetitive conduct would arise.

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To: The Commission

COMMENTS OF LIFETIME TELEVISION

Hearst/ABC-Viacom Entertainment Services, doing business as Lifetime Television ("Lifetime"), submits these comments in response to the Notice of Proposed Rule Making ("NPRM") released on December 24, 1992 in the above-captioned proceeding. Lifetime is a basic cable television network, launched in 1984, which serves an estimated 56.5 million subscribers on some 6,000 cable systems with contemporary, innovative programming. Much of Lifetime's weekly programming is intended to be of special interest to women. On Sunday, Lifetime Medical Television, the world's largest producer of programming for physicians, provides programming for the health care community.

Lifetime is a general partnership owned by companies with broadcast as well as cable television interests. Its majority owner is Hearst/ABC Video Services ("HAVS"), which holds a 53.3 percent general partnership interest. HAVS itself is a general partnership owned equally by Capital Cities/ABC Video Enterprises Inc., a subsidiary of Capital Cities/ABC Inc., and The Hearst Corporation. LT Holdings, Inc., a wholly-owned subsidiary of Viacom International Inc. ("Viacom"), holds a minority 33.3 percent general partnership interest in Lifetime. Another wholly-owned subsidiary of Viacom, Viacom Cable, owns and operates cable television systems.

These Comments are limited to a crucial issue raised in the NPRM, namely, the appropriate standard for determining whether a multiple cable system operator ("MSO") holds an attributable interest in a cable television network, thus rendering that network subject to the provisions of Section 628 of the Communications Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). Lifetime submits that the Commission should not simply adopt the broadcast attribution standards without appropriate modifications to balance the various concerns of Congress and preserve the well-documented benefits of MSO investment in cable television programming.

I. Introduction

Section 628 of the Communications Act prohibits a satellite cable programming vendor in which a cable operator holds an attributable interest from engaging in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming.[1] The statute requires the Commission to adopt certain regulations concerning discrimination in the price, terms and conditions of the sale or delivery of satellite cable programming, and certain types of exclusive contracts, for those programmers in which a cable operator holds an attributable interest.[2] Neither the Cable Act nor its legislative history imposes a specific definition of what constitutes an attributable interest.

In 1990 the Commission submitted a Report to Congress detailing its findings and conclusions after an extensive inquiry into the cable industry.[3] The 1990 Cable Report concluded that investment by cable operators was responsible for increasing both the quality and quantity of program services available to the

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[1] 47 U.S.C. Sec. 548(b).

[2] 47 U.S.C. Sec. 548(c)(2)(A)-(D).

[3] Report in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990)("1990 Cable Report").

viewing public;[4] fostering investment in more and better programming sources, leading to "a wealth of new viewing options"; providing financial support for faltering program services; promoting the introduction of new services by providing not only capital and a ready subscriber base but information about viewer tastes and reactions; and improving the quality of existing services.[5]

Significantly, Congress followed the 1990 Cable Report's direction, and thus the Cable Act does not prevent vertical integration. Indeed, Congress recognized the public service benefits of MSO investment in cable program services. The House Report cited testimony that vertical relationships "strongly promote diversity and make the creation of innovative, and risky, programming services possible." According to that testimony, a number of innovative cable programming services would not have been feasible without the financial support of cable operators.[6] Despite some concerns about potential undesired effects of vertical integration, the House Report stated that "[t]he Committee recognizes . . . that permitting system operators an equity position in programming services may be an efficient way of

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[4]Id. at ¶ 78.

[5]Id. at ¶¶ 82-85.

[6]House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) at 41 ("House Report"). See also NPRM at ¶¶ 5,7.

financing new service providers and compensating cable operators for assuming some of the risk associated with the launch of a new service."[7]

Rather than restricting MSO investment in cable programming to safeguard against anticompetitive practices, Congress instead imposed program access requirements. The single purpose of these requirements was to foreclose the possibility of competitive harm which might result from a significant degree of vertical integration. The FCC's standard for attribution should be formulated in this context.

II. The Commission Must Not Adopt The Existing Broadcast Attribution Rules Without Modification

A. Without Modification, The Broadcast Attribution Rules Are Too Broad For Purposes Of Implementing The Program Access Requirements

The NPRM seeks comment on whether the Commission should define "attributable interest" with reference to the existing broadcast attribution rules and, if so, which of those provisions should apply.[8] Nothing in the Cable Act requires the Commission to adopt those rules as the appropriate standard here. The NPRM apparently seeks comment on the broadcast attribution rules

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[7] House Report at 43.

[8] NPRM at ¶ 9. The broadcast attribution rules are contained in a note to the multiple ownership rules, 47 C.F.R. Sec. 73.3555 Note 2.

because of a reference to them in the Senate Report although, as the NPRM recognizes, it was not the Senate version of the program access requirements that Congress enacted into law in Section 628.[9] But even the Senate Report would have authorized the Commission to adopt whatever attribution criteria it "may deem appropriate."[10] The House version which was enacted does not define attributable interests.[11]

Under the circumstances, Lifetime submits that the Commission is not required simply to apply to Section 628 the attribution standards crafted to implement the broadcast multiple ownership rules. Moreover, without modification, the adoption of those standards would be over-inclusive in light of the particular concerns about anticompetitive actions underlying Section 628, and would hinder program investment and harm the existing

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[9]NPRM at ¶ 9.

[10]Senate Committee on Commerce, Science and Transportation, S. Report No. 102-92, 102d Cong., 1st Sess. (1991) at 78. In the horizontal and vertical ownership rulemaking, the FCC has also recognized that the broadcast attribution rules may be inappropriate. Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-264, FCC 92-542, released December 28, 1992 at ¶ 38.

[11]In contrast, the legislative history of the Cable Communications Policy Act of 1984 made clear that Congress intended the FCC to use its existing broadcast attribution rules for purposes of the statutory ban on common ownership or control of television stations and cable systems within their contours. H. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 55-56.

diversity in programming choices contrary to the Cable Act's goals.

Under the broadcast attribution standards, a cable network would be subject to the program access requirements simply because a cable operator held in that network a five percent voting stock interest, any general partnership interest, or any limited partnership interest if the partnership agreement did not contain each of the detailed provisions required by the attribution rules.[12] Attribution would also be required based on any common officers or directors unless a special certification was made.[13]

The broadcast attribution standards sweep so broadly because they were intended to measure influence on programming content, to serve First Amendment concerns (such as the diversity of viewpoints), rather than the potential for anticompetitive conduct. Indeed, the Commission's 1984 Report and Order in its comprehensive broadcast attribution rulemaking distinguished the less inclusive benchmarks used by other agencies which were "generally limited to precluding collusive or anticompetitive economic

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[12] 47 C.F.R. Sec. 73.3555 Note 2(a)&(g). Even a limited partnership agreement which complies with the Revised Uniform Limited Partnership Act would not necessarily be sufficient to insulate the limited partners from attribution under the existing broadcast standards. Ownership Attribution, 58 RR 2d 604, 616 (1985), recon., 61 RR 2d 739 (1986).

[13] 47 C.F.R. Sec. 73.3555 Note 2(h).

behavior, while our rules also encompass a fundamental concern with diversity of viewpoints . . ."[14] The Congressional interest underlying Section 628 is not encouraging a diversity of viewpoints in program content through ownership restrictions, but rather is addressing potential anticompetitive actions that could limit program availability.

Recognizing this, the NPRM rightly seeks comment on whether the implementing regulations should exclude operators or programmers that "lack significant anticompetitive potential due to their limited holdings."[15] Lifetime submits that applying the broadcast attribution rules to Section 628, without modification, would subject to regulation minority investments which create no real potential for anticompetitive actions.

Furthermore, the effect of an overly-broad attribution standard such as the broadcast rules would necessarily be to hinder capital investment in program creation and distribution. Cable operators would reduce their stake in existing programmers, and refrain from investing in new or failing program services, in order to avoid the statutory program access requirements. This

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[14] Report and Order in MM Docket No. 83-46 et al., 55 RR 2d 1465, 1476 (1984); recon., 58 RR 2d 604 (1985); further recon., 61 RR 2d 739 (1986).

[15] NPRM at ¶ 11. Although the NPRM raises the issue in connection with defining the anticompetitive harms to be addressed, it recognizes that this exclusion may be made through the attribution analysis. Id. at n.29.

result would contravene the Congressional policy underlying the Cable Act and Section 628 in particular, to ensure the continued expansion of programming offered and increase diversity.[16]

B. If Adopted, The Broadcast Attribution Rules Must be Appropriately Modified

In order to minimize the adverse impact of an overly-broad attribution standard, the Commission, should it decide to rely on the existing broadcast attribution rules, must adopt certain modifications to those rules to ensure that their wide sweep does not unnecessarily burden MSO investment in programmers where no anticompetitive potential exists. As one such modification, Lifetime proposes that the interest of a cable system operator, even if above the attribution benchmark, be exempted from attribution if another entity which is not a cable system operator holds an interest greater than 50 percent in the satellite cable programmer. Where one entity holds greater than a 50 percent interest in either a corporation or partnership, it must be deemed to have control. Neither a minority shareholder nor partner would have the power to force a programming vendor to

[16]Cable Act Sec. 2(b); 47 U.S.C. Sec. 548(a). Section 628 itself recognizes the essential link between capital investment by MSOs and diversity. The Commission, in making determinations on whether an exclusive contract serves the public interest, is directed to consider the effect of the contract on attracting capital investment in the production and distribution of new programming and on program diversity. 47 U.S.C. Sec. 548(c)(4)(C)&(D).

take anticompetitive actions. Thus, both should be excluded from attribution.

The Commission has recognized the significance of the 50 percent benchmark in other contexts. For example, under Section 310(d) of the Communications Act and the FCC rules, a "substantial" transfer of control of a broadcast licensee requires the filing of a long form application for FCC consent, publication and broadcast of a local notice, and a 30 day period for the filing of petitions to deny. The Commission has determined that a "substantial" transfer is one in which a voting interest of 50 percent or more passes to a new party.[17] Transfer of either a minority general partnership interest or a minority stock interest is generally not considered substantial.[18]

In addition to the rules implementing Section 310(d), the broadcast attribution rules recognize an exception for minority interests in corporations with a single majority shareholder. However, unlike the Commission's analysis of "substantial" transfers, this exception does not apply to partnerships. Lifetime submits that its proposed exception to the attribution rules under Section 628 should apply to partnerships as well as

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[17] Barnes Enterprises, Inc., 35 RR 2d 174, 180 (1975); Clay Broadcasters, Inc., 21 RR 2d 442, 446 (1971). See also Stephen F. Sewell, "Assignments And Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 318-324 (July 1991).

[18] 47 C.F.R. Sec. 73.3540(f)(6).

corporations, in order to avoid discouraging capital investment in certain commonly used forms of business enterprises. For example, if Lifetime were structured as a corporation, the 33.3 percent interest of Viacom, an MSO, would not be considered attributable because of the presence of a single majority shareholder, HAVS.[19] Because Lifetime is structured as a partnership, however, Viacom's minority interest would be attributed under the broadcast rules because the exception for entities with a single majority shareholder would not be available. The existing broadcast attribution standards would thus disfavor and discourage a business vehicle commonly used for its tax benefits.

Lifetime also submits that, for purposes of Section 628, it should be of no consequence that a cable system operator with a minority share in a program network has a common officer or director with the network. Such an officer or director, standing alone, could not create any more potential for anticompetitive behavior than the minority shareholder.

C. The Attribution Standard Should Contain A Measure Of Subscribers As Well As An Ownership Component

Arguably, a large MSO which does not hold a controlling ownership interest in a cable programmer might nevertheless exercise control over its program affiliation decisions if its systems served a significant percentage of the programmer's

[19]47 C.F.R. Sec. 73.3555 Note 2(b).

subscribers. Thus, Lifetime proposes an additional component to the attribution analysis to measure de facto control created by access to subscribers rather than ownership. Specifically, Lifetime proposes that despite the existence of a controlling entity without interests in cable systems, the program access requirements would be applied to an MSO holding a minority interest if it owns or operates cable systems serving more than five percent of the network's subscribers. The restrictions would only apply in those markets where the MSO's systems are located, because that is where the potential for anticompetitive conduct would arise.

Lifetime believes that this proposed measure would exclude those entities which, in the NPRM's words, lack significant anticompetitive potential.[20] An MSO which serves an insignificant percentage of a program network's subscribers is not in any position to dictate that network's affiliation policies. Moreover, practices involving systems serving a de minimis percentage of a cable network's customers do not significantly affect competition with respect to the overall availability of that network.[21]

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[20]NPRM at ¶ 11.

[21]The Commission recently imposed a similar structural component in relaxing its network-cable cross-ownership restriction. It allowed a broadcast network to acquire an attributable interest (measured by the broadcast attribution rules) in cable systems, subject to structural constraints to

III. Conclusion

Lifetime believes that if the Commission should adopt some form of the broadcast attribution rules, its proposed exception, with an additional subscriber-based safeguard, would protect the Congressional goal of encouraging investment in programming services to ensure diversity, while effectively implementing the statutory program access requirements.

Respectfully submitted,

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preclude possible anticompetitive conduct: no such combination may exceed ten percent of homes passed nationally and 50 percent of homes passed within an ADI. Report and Order in MM Docket No. 82-434, 70 RR 2d 1531 (1992).